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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98

OPPOSITION TO PETITIONS FOR RECONSIDERATION
REGARDING
ACCESS TO POLES, CONDUITS AND RIGHTS-OF-WAY

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Cable Television Association of Maryland, Delaware & the District of Columbia, Inc.
Montana Cable TV Association
South Carolina Cable Television Association
Texas Cable & Telecommunications Association

Their Attorneys

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Continental Cablevision, Inc., Jones Intercable, Inc., Century Communications Corp., Charter Communications Group, Prime Cable, InterMedia Partners, TCA Cable TV, Inc., Greater Media, Inc., Cable TV Association of Georgia, Cable Television Association of Maryland, Delaware & the District of Columbia, Inc., Montana Cable TV Association, South Carolina Cable Television Association, Texas Cable & Telecommunications Association (collectively "Joint Cable Parties"), respectfully submit this Opposition to the Petitions for Reconsideration and "Clarification" filed by the utilities concerning access to poles, conduits and right-of-way.

I. INTRODUCTION AND SUMMARY

The utilities seek wholesale reversal of each of the Commission's access rules and standards established by the *Interconnection Order*.[1] They do so without empirical support or explanation of how their requests can be squared with decades of practice, with the record assembled in this docket, or with the explicit dictates of the 1996 Telecommunications Act itself.

Among other measures, the utilities seek to:

- reserve all capacity on poles and in conduits and rights-of-way for themselves;
- leave attaching parties at risk of being ousted if they do not pay the utilities' own (subsequent) capital costs incurred for the utilities' own diversification;
- discriminate in favor of themselves and their affiliates;
- categorically forbid access to transmission poles (upon which many cable operators and other telecommunications providers already are located), and the right to attach wireless facilities, so that they can monopolize the market for wireless telecommunications;
- reverse the Commission's common-sense procedural rules for application permit processing, modification notice and access complaint proceedings;
- elevate their own misunderstanding of easement law into a tortuous "eminent domain" question.

[1]FCC's *First Report and Order*, FCC 96-325, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, (released Aug. 8, 1996) (*Interconnection Order*).

As an example of the utilities' continuing massive resistance to nondiscriminatory access, these positions are educational. As Petitions for Reconsideration, they are without merit.

As set forth more fully below, the utilities have failed to show any errors of fact or law and merely re-argue positions taken during the comment and reply comment stage of this proceeding. On reconsideration the utilities add no new facts, only repeating the same theoretical assertions, unsupported by empirical data or affidavit testimony.

II. PETITIONERS' SHOWINGS DO NOT JUSTIFY RECONSIDERATION OF THE COMMISSION'S RULING CONCERNING UTILITY RESERVATION OF POLE SPACE

A. The Commission Has Crafted A Generous Exception To Section 224's Ban On "Reserve Space"

Under decades of joint ownership and use agreements with incumbent local exchange carriers ("ILECs"), utilities have allocated prescribed amounts of vertical pole space to themselves and to the ILECs. But even under those "reservations," each party allowed the other to make use of reserved space so long as safety clearances could be maintained on each particular pole.[2] No one required the changeout or replacement of a suitable pole merely because one party might wish to use that space in the future. Likewise, under decades of practice with cable operator licensees, cable has been allowed to attach facilities to poles, regardless of any theoretical "reservation."

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[2]*See, e.g.,* Exhibits 1 and 2, Joint Use Agreement between Edison Sault Electric Co. and Michigan Bell Telephone Co., Art. I(e) (defining "Reserved" as space on a pole that is "unoccupied space provided and maintained by the Owner, either for its own use, or expressly for the Licensee's use at the Licensee's request."); Joint Use Agreement between Edison Sault Electric Co. and General Telephone Co. of Michigan, Art. I(e) (employing identical definition of "Reserved").

As we demonstrated in our Initial[3] and Reply[4] Comments, efforts by pole owners to shift the capital costs of poles necessitated by their own telecommunications ventures onto cable licensees led Congress to respond with pro-competitive, even-handed principles of nondiscriminatory access: every party is responsible for its initial makeready, after which each subsequent attachment or modification is to be paid for by the party needing that space, whether it is a new licensee or the pole owner itself.[5] This approach precludes, for example, an ILEC from deploying an open video system or Title VI cable system at the expense of an existing cable licensee, or an electric utility from building fiber for its telecommunications ventures at the expense of such a licensee.

From this principle, the FCC carved out a limited exception to allow electric utilities to subsequently recapture pole space which is actually reserved for specific core business purposes, *i.e.*, a *bona fide* development plan "that reasonably and specifically projects a need for that space in the provision of its core utility service." *Interconnection Order* ¶ 1169.

When a utility truly needs pole space under such a *bona fide* development plan for its core utility service, it then can request that attaching third parties pay the costs associated with the expansion of that capacity to remain on the poles. The exception is incredibly generous. It allows recapture where the statute, on its face, does not. It will require concerted FCC vigilance to make certain that a utility does not recapture space for competitive purpose under

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[3]Comments on Pole Attachment Issues of Joint Cable Commenters in CC Docket No. 96-98 (filed May 20, 1996) ("Initial Comments").

[4]Reply Comments on Pole Attachment Issues of Joint Cable Commenters in CC Docket No 96-98 (filed June 3, 1996) ("Reply Comments").

[5]47 U.S.C. § 224(h) and (i).

the guise that such recapture is for the utility's "core" business. Indeed, many utilities make massive investments in fiber infrastructure, and seek regulatory approval for using them on the pretext that the meter reading and load management functions which can be conducted over such facilities makes them all "electric" services.[6]

B. The Utilities Seek To Overturn the Jurisdictional Base of Section 224

But the utilities seek even more. Florida Power & Light Company ("FP&L"), and a large group of utility commenters whose entry into commercial telecommunications services is well-known, seek to recover the *carte blanche* right to exempt themselves from the access provisions of the Act on the theory that each specific pole to which telecommunications facilities have not yet been attached are beyond the jurisdiction of the FCC.[7] This is contrary to the jurisdictional premise of the 1978 Act, let alone the 1996 Act.

In legislative history to the 1978 Act, Congress explained that:

> The basic design of [Section 224] is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a State or more local regulatory forum is unavailable for resolution of disputes between those parties.[8]

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[6]*See,* Exhibit 3, Alan Breznick, *Charged Up -- Electric Utilities Seeing Bright Prospects in Building Broadband Networks,* Cable World, May 20, 1996 at 8; Petition for Reconsideration of Carolina Power & Light Co. at 17; Petition for Reconsideration of AEP *et al.* at 10-11.

[7]*See* Petition for Reconsideration of AEP *et al.* at 40 - 45.

[8]S. Rep. No. 580, 95th Cong., 1st Sess. 15 (1977).

As Senator Hollings explained, "FCC jurisdiction arises upon execution of the contract, regardless of the fact that at the moment the CATV system has not yet attached its facilities to the utility company's poles."[9] Legislative history makes clear that Commission jurisdiction does not attach on a pole-by-pole basis. Instead, Commission jurisdiction arises when utilities subject their pole plant to telecommunications use, which almost every utility has done through joint use with ILECs.

In 1996, Congress specifically crafted Section 224(f)(1), 224(h) and 224(i), to detail the obligations of non-discriminatory access. Each of these sections would be nullified if the utility could pretend that the very poles which are subject to joint use with ILECs are somehow bereft of telecommunications space. Through their novel interpretation, the utilities seek nothing less than the power to control the route design and system architecture of the very telecommunication carriers with whom they are competing. No legal justification is offered for ignoring conventional rules of statutory construction requiring full effect to be given to each clause and to assume that Congress knew what it had said before and chose not to change it.

C. Blanket Utility Space Reservations

Other utilities seek an only somewhat less immodest revision: to compel the up-front change out of poles perfectly suited for third-party attachment.[10] They seek here to exclude third parties from attachment, to drive up their fixed operational costs, and to coerce such parties

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[9]123 Cong. Rec. 5964 (Jan. 31, 1978).

[10]*See* Initial Comments at 7 (electric utility in Montana claims that 12 feet of unused space is "reserved" and that cable operator would have to pay to replace every pole); Reply Comments at 12 (Duke Power announced that henceforth all space on the pole is deemed reserved for its future use).

into paying for replacement poles wherever their cable television lines happen to be attached, in perpetuity.

On reconsideration, entities like UTC[11] seek to reserve space to build down toward the communications space. Congress prohibited this practice,[12] and the Commission correctly concluded this to be the case.[13] The utilities' efforts to erect makeready costs as a barrier to entry are particularly evident because they are precluded from even using the space they seek to reserve for core electrical services. UTC argues that reservation of all pole space above the communications space (the lowest usable space on the pole where telephone and cable facilities are attached) should be deemed presumptively reasonable.[14] In state proceedings, electric utility engineers have testified that they cannot attach electric lines below 22' and maintain the ground clearance required of electrical conductors.[15] UTC thus is attempting to lay claim to pole space

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[11]UTC's mission, is to encourage electric utilities to enter the communications business. It makes materials available instructing utilities on how they can leverage their monopoly ownership and control over poles, conduits and rights-of-way to attain competitive advantage in the communications services market. For example, UTC lists for sale a number of publications to instruct electric utilities in this art. UTC titles providing such instruction include: "How to Obtain a No Cost State of the Art Utility Telecommunications Network" (June 1994); "Models of Fiber Optic Opportunities for Utilities" (June 1994); "Trends in Utility Easement Law, Rights, Limitations and Maximizing Your Opportunities for the Communications Revolution" (January 1996); and "Entering the Telecommunications Common Carrier Market: Factors Every Utility Should Know" (June 1996).

[12]47 U.S.C. § 224(f)(1) and (i).

[13]*Interconnection Order* ¶ 1211.

[14]*See, e.g.,* Petition for Reconsideration of UTC at 8 - 9.

[15]*See* Exhibit 4, *In Re Application of Detroit Edison Co. and Consumers Power Co. for Authority to Modify Tariffs Governing Attachments to Poles*, Mich. Pub. Serv. Comm'n Case Nos. U-10810 and U-10741; Cross Examinations of Glenn R. Spence (Detroit Edison) Tr. 412; and Richard W. Hensel (Consumers Power) Tr. 258 - 59 (Jan. 8, 1996).

(and force cable operators and other attaching parties to pay for changeouts) when electric utilities are prohibited from using that space for their core electric services.

D. Utilities May Not Make Blanket Pole Space Reservations

FP&L, AEP and others essentially claim that utilities should be permitted to reserve pole space by broad areas and regions, rather than along particular pole routes on particular poles.[16] The Commission determined that any attempted utility space reservation be conducted on a pole-by-pole basis because that is the scheme that utilities themselves have selected for the permitting and occupancy of third party attachments.[17] Utilities never would permit one of several cable operators franchised to a county to "reserve" the first 12 inches above telephone on every pole in that county. They would insist upon specific applications for specific poles on specific routes, and then only subject to the maximum limits set forth by contract for the number of poles which may be under application at any one time. The only non-discriminatory approach consistent with this treatment is to require utilities to assert capacity reservation on a pole-by-pole (or duct-by-duct) basis.

The utilities seek to enlarge the Commission's generous exception to swallow Section 224(f)(1) and the access standards promulgated thereunder. The utilities have failed to present any new empirical data or any reason why the Commission should reconsider its reserve

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[16]Petitions of FP&L at 10 - 13; AEP, *et al.* at 11 - 14.

[17]*See e.g.*, Exhibit 5, Pole Attachment Agreement of Texas Utilities Electric Co., § 4.1 ("Licensee may designate a Pole or Poles on which it desires to attach . . . . Each such designation shall be made by Licensee by submitting to TU Electric . . . a Permit Application . . . specifying, in the appropriate spaces thereon, the type of work Licensee desires to perform and the Pole or Poles on which such work is to be performed."); Exhibit 6, Master Pole License Agreement of Union Electric Co., § B(1)(b) ("Before installing attachments on any of Licensor's poles, Licensee shall make application and receive a permit therefor . . . which shall specify, among other things, the location of the poles to be attached . . .").

space findings in the *Interconnection Order.* Under their various formulae (all of which were unsuccessfully advanced in earlier stages of this proceeding) they could exclude third parties from attachment, drive up attaching parties' costs of entry, and finance their own diversification at the expense of the very parties with whom they seek to compete.[18] The Commission should reject these efforts.

III. INSTALLATION OF NEW FACILITIES AND CAPACITY FOR THE BENEFIT OF THIRD PARTIES

Many utilities argue on reconsideration that they should not be required to replace poles with taller poles solely for the benefit of third parties.[19] These are the same utilities whose own electrical service expansion has required the migration from standard 35-foot poles in the 1950s to 45-foot poles in the 1990's in order to accommodate vertical racking of multiple electrical conductors and the higher loads required today. Even the most cursory examination of this request shows it to be antithetical not only to decades of practice, but to the core congressional directive to provide "non-discriminatory access to poles, conduits and rights-of-way." 47 U.S.C. § 224(f)(1). The utilities seek on reconsideration to gut the pro-competitive purposes of the 1996 Act and reserve bottleneck control over this essential corridor to themselves. The Commission correctly found that this provision means simply that if a utility expands

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[18]Similarly, the Commission should reject utility arguments that it "clarify" that cable operators and other attaching parties accept proportionate cost responsibility for pole replacements required by destruction (*i.e.*, storm or motor vehicle accident) and normal wear and tear. The utilities here seek nothing less than to require cable operators and other attaching parties to absorb the costs of their infrastructure development and maintenance when such costs are not contemplated by the costs sharing provisions of Sections 224(h) and (i).

[19]*See, e.g.,* Petitions of ConEd at 3 - 4; FP&L at 6 - 9; and AEP, *et al.* at 8 - 11.

capacity for itself, it must do so for others,[20] an obligation that Congress has imposed on public utilities in their capacity as custodians of essential public corridors critical to the provision of telecommunications facilities.

IV. THE COMMISSION SHOULD NOT RECONSIDER ITS CORRECT FINDING TO REQUIRE ACCESS TO UTILITY TRANSMISSION STRUCTURES

Next, the utilities seek to remove transmission structures from the list of support structures to which they are required to provide access to cable operators and other telecommunications providers.[21] The character of the circuit does not define the suitability of the pole for attachment.[22] There is no engineering, safety or any other reason justifying this blanket prohibition on transmission structure access. Access to transmission facilities has never been categorically forbidden, and the FCC's own case precedent reflects such use.[23]

Moreover, it is not uncommon for utilities to place both transmission circuits and distribution circuits on the same (tall) pole, "underbuilding" the transmission lines with electric

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[20] *Interconnection Order* ¶ 1162.

[21] *See, e.g.,* Petitions of ConEd at 11; FP&L at 33 - 36; and AEP *et al.* at 37 - 40.

[22] The utilities' position is markedly different from the approach taken with their co-parties in joint use agreements. For example, attached as Exhibit 7 is a blank joint use agreement of a Michigan electric utility and a telephone utility which states that "each party should be the judge of what the character of its circuits should be to meet its own service requirements and as to whether or not these service requirements can be properly met by joint use poles." *See* General Agreement for the Joint Use of Poles of Consumers Power Co. at 1. The regime that the utilities sought below, and here on reconsideration would make the utility pole owners themselves the sole arbiter of the attachments, architecture and route plans of cable operators and other telecommunications providers.

[23] *See, e.g., Teleprompter Corp. v. Alabama Power Co.,* File No. PA-81-0014, at ¶ 21 (1981); *Teleprompter Corp. v. Alabama Power Co.,* FCC 83-500, File No. PA-81-0014, at ¶ 13 - 14 (1983).

secondary distribution service lines. Such a configuration is illustrated in the photograph appearing at Exhibit 8.[24]

Grant of the utilities' request for a global carve-out of so-called transmission poles from the Act's access requirements will create the blueprint for evading the Act's access provisions.

V. THE UTILITIES ON RECONSIDERATION ARE ATTEMPTING TO MONOPOLIZE THE MARKET FOR WIRELESS TELECOMMUNICATIONS

Just as the utilities seek the exclusion of telecommunications competitors from attaching to transmission structures, identical anti-competitive motivations drive utility attempts to limit the nature of third-party attachments and exclude unaffiliated companies from the provision of wireless telecommunications.[25] Here, the utilities are attempting to exclude unaffiliated parties from attaching communications facilities to their transmission structures so that they can have exclusive use of those structures for commercial (primarily wireless) telecommunications ventures. The utilities caricature true safety concerns and instead paint an amusing portrait of dishes and antennae stapled to every pole top and support structure.

The debate, however, is really about wireless. Kansas City Power & Light has developed what has been described as the largest pole-mounted wireless network in the world.[26]

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[24]*See* Declaration of Charles Anthony Boyd, State Engineer for TCI Cablevision of Texas ¶ 6.

[25]*See, e.g.,* Petitions of ConEd at 11 - 12; FP&L at 24 - 26; AEP *et al.* at 26 - 29; Duquesne Electric at 17-18.

[26]*See* Exhibit 9, *Wireless: Kansas City Power & Light and CellNet's Wireless Network Connect Over 200,000 Customers,* Edge, June 17, 1996.

BG&E is developing a similar network.[27] Texas Utilities Electric Company ("TU Electric") is a partner with a number of BOCs[28] in the PCS Primeco partnership.[29] Late last week, AEP whose comments and petition profess concern with the protection of the Nation's electric grid, announced that it had formed AEP Communications as a non-regulated company "to offer wireless PCS carriers services to help establish and maintain networks, including the location and construction of antenna facilities."[30]

Electric utility migration to wireless occurs at a time when wireless providers nationwide are in a desperate search for microcell sites. Many of these facilities which the utilities seek to exclude are no larger, and no heavier, than standard strand-mounted amplifiers, tap enclosures and similar equipment used in the current provision of cable television service.[31] Neither the plain language of the Act, nor its purposes, support the utilities' prayer to be given monopoly control over the deployment of such facilities.

The Commission should regard the utilities' claims regarding the types of facilities to be attached to support structures with great skepticism. The access standards enunciated in

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[27]*See* Exhibit 10, Teresa Hansen, *Two-Way Communications Promote Value-Added Services,* Electric Light & Power, June, 1996, at 15.

[28]Specifically, TU is a 20% limited partner in PCS PrimeCo., the AirTouch - Bell Atlantic - Nynex - US West partnership that holds PCS spectrum in the Dallas, Houston, and San Antonio areas. Carl Weinschenk, *Dream Partners?,* Cable World, Oct. 30, 1995 at 54.

[29]Attached as Exhibits 11 and 12 to this Joint Opposition are photographs depicting transmission towers of TU Electric in the Dallas-Ft.Worth metroplex. These photographs clearly show both the presence of wireless (PCS) telecommunications transmission facilities at the top of the towers, as well as telecommunications equipment sheds placed at the base of such towers. *See also*, Declaration of Charles Anthony Boyd ¶ 3.

[30]*Communications Daily*, Oct. 24, 1996, at 9.

[31]*See* Exhibit 13, Vince Vittore, *Architectural Advances Prompt Cable's Renewed PCS Interest,* Cable World, Oct. 28, 1996, at 47.

the *Interconnection Order* adequately address legitimate engineering and safety concerns and should not be reconsidered to allow utility pole owners to monopolize wireless telecommunications.

VI. THE COMMISSION SHOULD NOT RECONSIDER ITS 45-DAY UTILITY RESPONSE TIME FOR ATTACHMENT PERMIT APPLICATION PROCESSING

In promulgating amendments to Rule 1.1403 the Commission found that a utility must provide attaching parties access to poles, conduits and rights-of-way, or provide a written denial of deny access, within 45 days. 47 C.F.R. § 1.1403(b). The utilities, however, seek reconsideration of this reasonable finding.[32] Many standard pole attachment agreements provide an even shorter time for according or denying access.[33] Indeed, a recent agreement stipulated between AT&T and Pacific Gas & Electric provides a response time a short as ten days for routine requests, up to a ***maximum*** of 30 days for very large and complex access requests.[34] The utilities' request for longer response time in which to provide access falls short of modern industry practice and is, therefore, unreasonable.[35]

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[32]*See, e.g.,* Petitions of AEP, *et al.* at 21 - 26; FP&L at 18 - 23.

[33]*See, e.g.,* Exhibit 14, Pole Attachment Agreement of Kansas City Power & Light Co., Art. III(1) (providing that KCP&L "shall approve or disapprove each application as soon as practical, and all applications shall be approved or disapproved within thirty (30) days after receipt thereof . . .").

[34]A copy of this stipulation is attached as Exhibit 15. *In re Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service,* ALJ's Ruling Soliciting Written Comment on Rights-of-Way Issues, Cal. P.U.C. R.95-04-043, at Attachment 3, page 1, (Sep. 10, 1996).

[35]Moreover, utility arguments that adoption of the 45-day notice requirement somehow violates the Administrative Procedure Act (and is arbitrary and capricious) is without merit. Indeed, in attempting to argue that the Commission was somehow deficient in not specifically announcing its intention to adopt a specific notice period some utilities

VII. THE COMMISSION SHOULD NOT RECONSIDER ITS FINDING THAT UTILITY POLE OWNERS MUST PROVIDE ATTACHING PARTIES 60 DAYS' ADVANCE NOTICE FOR POLE MODIFICATIONS

The Commission's decision to require 60 days' advance notice prior to modification of facilities on the pole both reflects industry practices that have developed between the cable television industry and utility pole owners over time,[36] and, is a reasonable accommodation of parties commenting on this issue in this proceeding.[37]

Industry practice makes 60 days a common period for joint coordination of projects requiring facilities modification.[38] In addition, the Commission has created a specific carve-out for true emergency situations whereby the pole owner must provide notices as soon as practicable after any facilities modification.[39] In any case, the Commission reached a reasonable

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acknowledge that they "recognize that an agency's notice need not identify every precise proposal that the agency may finally adopt." Petition of AEP, *et al.*at 24. The Commission's Notice relative to poles, conduits and rights-of-way was to promulgate regulatory standards for "non-discriminatory access to poles, conduits and rights-of-way". The timing of such access is critical both to assuring the reasonableness of such access, and that such access is truly non-discriminatory. Arguments that timing of notice issues do not logically extend from non-discriminatory access principles are unavailing.

[36]UTC argues that specific agreements between utility pole owners and attaching parties concerning modification notice and rearrangement procedures and costs should supersede FCC requirements. Petition of UTC at 12 - 13. While the Joint Cable Parties agree that there are many circumstances in which utility pole owners and cable operators in fact negotiate mutually acceptable procedures for such matters, this fact does not warrant the reconsideration of the Commission's finding on the timing of modification notices, nor a ruling that (frequently adhesive) utility pole attachment agreements in any fashion should "supersede" federal law, notwithstanding strained utility arguments that even ***rate*** matters should be left to "negotiation." *See, e.g.,* Petitions of AEP *et al.* at 34 - 37; FP&L at 30 - 33.

[37]*Interconnection Order* ¶ 1209.

[38]*See* Declaration of Charles Anthony Boyd ¶ 7 (stating that 60 days' notice is a reasonable period).

[39]*Interconnection Order* ¶ 1209.

compromise based on the positions advanced at rulemaking and on reply which should provide pole owners and attaching parties with the structure for cooperation.[40]

VIII. THE COMMISSION SHOULD NOT RECONSIDER ITS FINDING THAT UTILITY POLE OWNERS CARRY THE BURDEN OF PROOF IN ACCESS DENIAL PROCEEDINGS

In the *Interconnection Order*, the Commission found that in addition to the NESC, "[o]ther industry codes also will be presumed reasonable if shown to be widely-accepted objective guidelines for the installation and maintenance of electrical and communications facilities."[41] Now citing potential "sabotage" and "terrorism" as reasons for not disclosing system maps and plats to support its denial of access,[42] ConEd echoes the identical unsuccessful argument made below. The utilities here again are attempting to secure a procedural rule that requires a party denied access to (i) prove that a utility standard exceeding the NESC is not reasonable, while (ii) denying such party the necessary information to do so.

Just as the pole complaint rules require utilities to produce underlying financial and other data relied upon for determining its annual attachment rate,[43] and just as the Commission presumes the amount of usable space to be 13.5 feet unless rebutted by the utilities' own continuing property records, utilities must produce objective engineering evidence of why

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[40]*Interconnection Order* ¶ 1207. There, the Commission notes that a 60-day notice period was recommended by diverse parties such as US West, Cincinnati Bell, AT&T and GST Telecom. *Id.*

[41]*Interconnection Order* ¶ 1151.

[42]Petition of ConEd at 9.

[43]47 C.F.R. § 1.1404(h).

denial is reasonable.[44] Utilities, who create such codes and are in exclusive possession of their rationale, must be called upon to produce and defend them.

Moreover, joint use agreements between electric utilities and telephone companies typically provide that "[a]ll poles shall be considered as suitable for joint use and may be constructed by either party without prior notification . . ."[45] Thus, under joint use agreements, all poles are presumptively suitable for attachment, while under the burden of proof standard the utilities attempt to argue again on reconsideration, all poles are presumptively *not* suitable for third party attachments and it is up to the cable operators and others to prove their suitability. This violates the non-discrimination provisions of Section 224(f)(1).

IX. THE COMMISSION MAY TAKE THIS OPPORTUNITY TO CORRECT MINOR ERRORS IN THE RULES

The utilities have correctly pointed out that there is an inconsistency between the text of the *Interconnection Order* which says that an access complaint must be brought within 60 days of any denial, and Rule 1.1404(k) which says that such an action must be brought within 30 days of denial.[46] The Commission should incorporate in that rule the 60-day filing period specified in the text, as intended by the *Interconnection Order.* The longer time period will have the substantial practical benefit of enabling attaching parties and utility pole owners, both

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[44]47 C.F.R. § 1.1404(g)(11).

[45]Exhibit 7, General Agreement for the Joint Use of Poles of Consumers Power Co. at 1.

[46]*Interconnection Order* ¶ 1225; 47 C.F.R.§ 1.1404(k).

independently and cooperatively, to explore alternative access methods, possibly avoiding the need to file an access complaint.

Similarly, the Commission ruled that "[a] utility or other party that uses a proposed modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost."[47] Rule 1.1416(b) should incorporate this requirement explicitly, so that all parties, including the utility pole owner, must pay a proportionate share of modification costs associated with correction of its pre-existing safety violations. Absent this revision to the rule, utilities would be able to shift the cost burden of correcting such violations to other pole occupants, in a manner fundamentally inconsistent with the cost allocation principles of Section 224.[48]

X. THE COMMISSION SHOULD NOT RECONSIDER THE REQUIREMENT THAT UTILITIES EXERCISE THEIR EMINENT DOMAIN AUTHORITY TO ADVANCE TELECOMMUNICATIONS COMPETITION

A number of utilities[49] complain that the Commission is requiring them to exercise eminent domain authority to expand an existing right-of-way over private property in order to accommodate a request for access. The utilities' discomfort has more to do with their historic

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[47]*Interconnection Order* ¶ 1212.

[48]Similarly, Joint Cable Parties agree with Duquesne Light Company that the Commission should harmonize the discrepancies between the text of Rules 1.1402(b) and 1.1416(b) set forth in the *Interconnection Order* and in its Order in CS Docket No. 96-166. *Implementation of Section 703 of the Telecommunications Act of 1996, Amendments and Additions to the Commission's Rules Governing Pole Attachments*, FCC 96-327 (Aug. 6, 1996).

[49]*See, e.g.,* Petitions of AEP, *et al.* at 14 - 21; FP&L at 14 - 18; and UTC at 3 - 5.

misunderstanding of cable's easement rights than with any supposed agency overreaching. Even prior to 1984, common law permitted cable operators to make use of compatible utility easements.[50] Many utilities attempted to deny this, by inserting clauses in pole agreements purporting to require cable to obtain their own easements. Courts continued to "apportion" the easements in favor of cable's use, on the theory that compatible use placed no burden on the servient estate. Indeed, they did so at the behest of the utilities when the utilities sought to place fiber in an electrical easement.[51] In 1984, Congress codified this common law doctrine, and voided efforts to restrict such apportionment,[52] which itself is now widely reflected in case law.[53]

Many utilities, however, continue to ignore the law. On inquiry from customers, for example, they will state that cable has no right to be located in the easement. Thus, the problem which has percolated up to the Commission is of the utilities' own making. If they would pause, reflect, and obey the law of apportionment, there would almost never be cause to exercise eminent domain for an attaching partly -- because parties can only attach to facilities

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[50]*See, e.g., Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674 (N.Y. App. Div. 1976); *Jolliff v. Hardin Cable Television Co.*, 269 N.E.2d 588 (Ohio 1971); *Clark v. El Paso Cablevision, Inc.*, 475 S.W.2d 575 (Tex. Civ. App. 1971).

[51]*Cousins v. Alabama Power Co.*, 597 So.2d 683 (Ala. 1992).

[52]47 U.S.C. § 541(a)(2). Indeed, it was explained in the House Report to the 1984 Act that "[a]ny private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this [law] and not enforceable." H.R. REP. NO. 934 at 59.

[53]*See, e.g., Laubshire v. Masada Cable Partners II,* No. 95-CP-04-988 (S.C. Ct. C.P. Apr. 24, 1996); *Cable TV Fund 14-A, Ltd. v. Property Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422 (D. Md. 1989). In addition, a number of courts have found that the addition of cable television wires has no notable effect on the utility easement in questions, which, in other words, places no additional burden on the property over which an easement is granted. *See, e.g., Witteman v. Jack Barry Cable TV*, 228 Cal. Rptr. 584, 586 (Cal. App. 1986), *remanded*, 742 P.2d 779 (Cal. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Salvaty v. Falcon Cable Television*, 212 Cal. Rptr. 31 (Cal. App. 1985); *Henley v. Continental Cablevision of St. Louis County, Inc.*, 692 S.W.2d 825 (Mo. Ct. App. 1985).

which the utilities themselves have place in compatible easements. If there is ever an occasion which departs from this common sense analysis, it is better addressed on a case-by-case basis, rather than by blanket reconsideration.

The non-discriminatory access obligation that the 1996 Act imposes for utilities is necessary to the continued performance of their public duty or public function; it constitutes a permissible public use and is necessary for the utilities' corporate purposes.[54] Other utilities have recognized this principle, as evidenced by a recent stipulation by Southwestern Bell Telephone to the State of Texas in which the utility agreed to exercise its eminent domain power as part of its duty to make rights-of-way available.[55]

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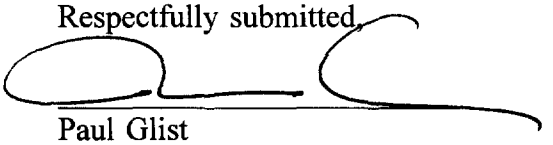
[54]*See, e.g., Neptune Assocs. v. ConEd,* 509 N.Y.S.2d 574 (N.Y. App. Div. 1986).

[55]*See* Exhibit 16, Stipulation on Poles, Ducts, Conduits and Rights-of-Way Access to Public and Private Rights-of-Way By Southwestern Bell Telephone and AT&T, Oct. 3, 1996 ("SWBT agrees to act as AT&T's agent at AT&T's expense in any condemnation proceedings to the extent such a proceeding is required . . .").

CONCLUSION

For these reasons, the Joint Cable Parties respectfully request that the Commission deny the petitions for reconsideration and/or clarification submitted by the various utility pole owners in this docket.

Respectfully submitted,



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Continental Cablevision, Inc.
Jones Intercable, Inc.
Century Communications Corp.
Charter Communications Group
Prime Cable
InterMedia Partners
TCA Cable TV, Inc.
Greater Media, Inc.
Cable TV Association of Georgia
Cable Television Association of Maryland, Delaware & the District of Columbia, Inc.
Montana Cable TV Association
South Carolina Cable Television Association
Texas Cable & Telecommunications Association

Their Attorneys

October 31, 1996

INDEX TO ATTACHMENTS

Exhibits

1. Joint Use Agreement between Edison Sault Electric Co. and Michigan Bell Telephone Co.

2. Joint Use Agreement between Edison Sault Electric Co. and General Telephone Co. of Michigan.

3. Alan Breznick, *Charged Up -- Electric Utilities Seeing Bright Prospects in Building Broadband Networks,* Cable World, May 20, 1996 at 8.

4. Transcript Excerpts: *In Re Application of Detroit Edison Co. and Consumers Power Co. for Authority to Modify Tariffs Governing Attachments to Poles*, Mich. Pub. Serv. Comm'n Case Nos. U-10810 and U-10741; Cross Examinations of Glenn R. Spence (Detroit Edison) Tr. 412; and Richard W. Hensel (Consumers Power) Tr. 258 - 59 (Jan. 8, 1996).

5. Pole Attachment Agreement of Texas Utilities Electric Co.

6. Master Pole License Agreement of Union Electric Co.

7. General Agreement for the Joint Use of Poles of Consumers Power Company.

8. Photo: Utility pole with transmission circuits and distribution circuits attached.

9. *Wireless: Kansas City Power & Light and CellNet's Wireless Network Connect Over 200,000 Customers,* Edge, June 17, 1996.

10. Teresa Hansen, *Two-Way Communications Promote Value-Added Services,* Electric Light & Power, June, 1996, at 15.

11. Photo: Transmission tower of Texas Utilities Electric Company in the Dallas-Ft.Worth metroplex, showing the presence of wireless (PCS) telecommunications transmission facilities at the top of the tower.

12. Photo: Telecommunications equipment shed placed at the base of a transmission tower of Texas Utilities Electric Company in the Dallas-Ft.Worth metroplex.

13. Vince Vittore, *Architectural Advances Prompt Cable's Renewed PCS Interest,* Cable World, Oct. 28, 1996, at 47.

14. Pole Attachment Agreement of Kansas City Power & Light Co.

15. *In re Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service,* ALJ's Ruling Soliciting Written Comment on Rights-of-Way Issues, Cal. P.U.C. R.95-04-043 (Sep. 10, 1996).

16. Stipulation on Poles, Ducts, Conduits and Rights-of-Way Access to Public and Private Rights-of-Way by Southwestern Bell Telephone and AT&T, Oct. 3, 1996.

Declaration

Declaration of Charles Anthony Boyd.